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Supreme Court of the United States

October Term—1966

No. 441

SANDOR SCHWARTZ,

Petitioner,

against

CYRUS S. EATON, WALTER J. TUOHY, CYRUS S. EATON, JR., CLINTON W. MURCHISON and ANITA O'KEEFFE YOUNG, as Executrix of the Estate of Robert R. Young, Deceased,

Respondents.

ROBERT BOWMAN, ROBERT J. BULKLEY, HERBERT FITZPATRICK, ALLAN P. KIRBY, WILLIAM H. LIPSCOMB, HARRY C. THOMPSON, THOMAS J. DEEGAN, JR., BARNUM L. COLTON, ROGER H. FERGER, MARTIN S. FOTHERINGHAM, FAY A. LEFEVRE, SIDNEY W. RICHARDSON, ALLEGHANY CORPORATION and THE CHESAPEAKE & OHIO RAILWAY CO.,

Defendants.

BRIEF OF RESPONDENTS CYRUS S. EATON, WALTER J. TUOHY AND CYRUS S. EATON, JR. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARL E. NEWTON
2 Wall Street
New York, New York 10005

M. LAUCK WALTON
2 Wall Street
New York, New York 10005

Attorneys for Respondents Cyrus S. Eaton, Walter J. Tuohy and Cyrus S. Eaton, Jr.

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Opinions Below

On July 19, 1965, the United States District Court (S. D. N. Y.) dismissed the complaint in this action as to respondents, for lack of jurisdiction over the subject matter. The opinion (Hon. Frederick van P. Bryan) is reported in *Schwartz* v. *Bowman,* 244 F. Supp. 51.

On May 19, 1966 the Court of Appeals (2nd Circuit) in a brief *per curiam* memorandum opinion affirmed, "... on the exhaustive and learned opinion below of Judge Bryan in *Schwartz* v. *Bowman*. . . ." The Court of Appeals' opinion is reported at 360 F. 2d 211, under the caption *Schwartz* v. *Eaton*.

Jurisdiction

Petitioner files a petition for certiorari seeking review of the *per curiam* decision of the Court of Appeals which affirmed the District Court's dismissal of the complaint as to respondents.

The Statutes Involved

Urgent Deficiencies Act:

> 28 U. S. C. §2321: "The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter."
>
> 28 U. S. C. §2322: "All actions specified in §2321 of this title shall be brought by or against the United States."

Interstate Commerce Act:

> 49 U. S. C. §5 (3): "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in

such order, be considered as a carrier subject to . . . Section 20 (1) to (10), inclusive, of this part [I] . . . and section 20a (2) to (11), inclusive, of this part, . . . including in each case the penalties applicable in the case of violations of such provisions."

Investment Company Act of 1940:

15 U. S. C. §80 a-3:

* * *

"b) . . . none of the following persons is an investment company within the meaning of this subchapter:

* * *

"(9) Any company subject to regulation under the Interstate Commerce Act. . . ."

The Question Presented

Do sections 2321 and 2322 of Title 28 of the United States Code require that an action seeking to annul regulatory orders of the Interstate Commerce Commission be brought against the United States?

Statement of the Case

Petitioner, a stockholder of the Chesapeake and Ohio Railway Company (C&O), a common carrier by rail, sues derivatively to void and rescind a sale of 800,000 shares of New York Central common stock by C&O. The alleged basis for this relief is that the buyer (allegedly Alleghany Corporation) was not registered with the SEC as an investment company under the Investment Company Act of 1940

at the time the transaction occurred. The transaction attacked took place on February 23, 1954.

About a month earlier, on January 19, 1954, Alleghany Corporation had taken the first steps to divest itself of control of C&O.

The following facts are not controverted:

(1) prior to the transaction (to wit: on June 5, 1945) the Interstate Commerce Commission, by Div. 4, ordered that

> "unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act to the same extent that those provisions are applicable to the Chesapeake and Ohio Railway Company and its carrier subsidiaries and affiliates. . . ." (R. 581-82, App. 1a-3a)

In its decision of June 5, 1945, on which the above order was entered, the Commission imposed various conditions and concluded

> "We shall retain jurisdiction to make such further order or modification of the order to be entered herein as may hereafter be necessary or appropriate." *Chesapeake & O. Ry. Purchase,* 261 ICC 239, 262.

(2) Subsequent to the transaction (to wit: on March 2, 1955) the ICC, by Div. 4, ordered

> "That the effective portions of the order of June 5, 1945 . . . be and they are hereby terminated and shall be of no further force and effect." (R. 583-84, App. 8a-10a).

The decision on which the above order was entered is *Louisville & Jeffersonville Bridge & R. R. Merger,* 290 ICC 725.

On May 24, 1955 the ICC ordered

> "That the order dated March 2, 1955 . . . be and it is hereby, affirmed." (R. 585-86, App. 11a-13a)

The decision on which the above order was entered is *Louisville & Jeffersonville Bridge & R. R. Merger,* 295 ICC 11.

(3) Referring to its order of June 5, 1945, Division 4 of the ICC held on March 2, 1955

> "Without our further order, the voluntary action of Alleghany on and after January 19, 1954 divesting itself of its stockholdings and control of Chesapeake [C&O Ry.] and removing from deposit in the voting trust agreements, the controlling holdings of other carriers' stocks and disposing of such holdings, could not operate to alter the status of Alleghany as a carrier subject to the act." (*Louisville & Jeffersonville Bridge & R. R. Merger,* 290 ICC 725, 732-33).

The ICC predicated its analysis on the finding

> "that Alleghany's status as a carrier cannot be modified or otherwise altered unless and until we order an appropriate change." (290 ICC 725, 733).

No modification of the June 5, 1945 order was made between June 5, 1945 and March 2, 1955—a period spanning the date of the transaction attacked, which was Feb. 23, 1954.

The instant action was brought before a single-judge district court. It was not brought against the United States.

The District Court stated the basis of its decision as follows:

> ". . . the action necessarily involves an attack on the validity of these ICC orders. . . ."
>
> • • •
>
> "None of the requirements of the Urgent Deficiencies Act have been met."
>
> • • •
>
> "No opportunity was given for the ICC or whatever other parties in interest there may be to appear as of right or for such intervention of other parties as the act allows. 28 U. S. C. §2323."
>
> • • •
>
> "It is now apparent that jurisdiction under the Investment Company Act does not exist. The court in this action has no power to consider or determine the question which is basic to relief under that [Investment Company] Act—the validity of the ICC orders here under attack. . . . The validity of the orders can be tested only in an appropriate action under the Urgent Deficiencies Act." (244 F. Supp. 51, 68-69).

It is of incidental interest to note that at the time of the transaction there were no orders of the Securities Exchange Commission in conflict with any of the above ICC orders. It is not controverted that on October 4, 1945 the SEC entered an order in *In Re Alleghany Corp.*, 20 SEC 731, which

> "DECLARED that Alleghany Corporation has ceased to be and is not now an investment company within the meaning of the Investment Company Act of 1940 . . ."

and ordered—

> "that the registration of Alleghany Corporation under the Investment Company Act of 1940 shall forthwith cease to be in effect, *provided, however,* that if in the future Alleghany Corporation ceases to be subject to regulation under the Interstate Commerce Act . . . this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing." (R. 588, App. 4a-5a).

The Record shows the SEC's attestation that "the aforesaid order was not revoked, suspended or modified" between "October 4, 1945 and December 9, 1955"—twenty-two months after the transaction attacked in this action (R. 587, App. 6a-7a).

Petitioner's action proceeds on two major erroneous assumptions of fact. First, petitioner asserts that the 1945 order (which subjected Alleghany to regulation as a carrier) was predicated solely upon Alleghany's control of C&O despite the fact that the 1945 order clearly shows that Alleghany then controlled or had interests in other carriers. As the District Court herein held, some of those interests were still owned by Alleghany at the time Alleghany's regulatory status is claimed to have been altered by the sale of Alleghany's stock holdings of C&O and at the time of the transaction attacked. In disposing of this fallacious assumption, Judge Bryan noted:

> "... during the relevant period, and after its divorcement from C&O, Alleghany continued to have other substantial interests in the Pittston Company and in the Missouri Pacific Railroad." (244 F. Supp. at 60).

Petitioner's second erroneous assumption is that Alleghany's control of C&O terminated instantly on January 19, 1954, the date the sale of Alleghany's C&O stock was consummated. The Commission's finding was that Alleghany's divestiture of control of C&O occurred "on and after" January 19, 1954. See p. 5, *supra*. Some of the steps taken *after* January 19, 1954 to complete the termination of such control are mentioned in Judge Bryan's opinion in *Schwartz* v. *Bowman*, 244 F. Supp. 51 at pp. 57-58. It appears therefrom that these steps were not completed until on or about March 31, 1954.

If petitioner seeks a factual determination of Alleghany's status on February 23, 1954, the ICC has sole and plenary jurisdiction to determine, in the first instance, whether Alleghany's interests in Pittston, United States Trucking Co. and Missouri-Pacific were sufficient to continue ICC regulatory jurisdiction over Alleghany. Similarly, only the ICC has jurisdiction to determine when Alleghany's control of C&O actually ceased. 49 USC §5 (2), (3), (11).

To these erroneous assumptions of fact, petitioner then adds an error of law, for he reasons that if Alleghany's control of C&O ceased, Alleghany's status as a carrier should also automatically cease forthwith, even without a finding of that fact or of any other pertinent facts, *and without modification of the 1945 order which stated on its face that it would remain in effect "unless and until otherwise ordered by this Commission."* (R. 581-82, App. 1a-3a). Petitioner ignores this crucial legal problem, and this was the basis for the dismissal of his action by the Courts below.

The District Court had to look no further than the face of the 1945 order (which flatly asserted ICC regulatory

jurisdiction over Alleghany) and the face of the 1955 orders (which "retained" that regulatory jurisdiction). Patently, petitioner's suit disputing the validity of that regulatory jurisdiction is an attack on these orders. Consequently, the courts below were constrained to hold that petitioner's action seeking to annul these orders must meet the jurisdictional prerequisites for an attack upon an ICC order.

The extrinsic facts on which plaintiff predicated his argument in the District Court are disposed of in the opinion of the District Court, *Schwartz* v. *Bowman*, 244 F. Supp. 51 at pp. 56-60, and need be dealt with here only briefly. At page 6 of his petition, petitioner asserts that the facts pertinent here are those contained in the court's findings in the *first* 3-Judge court's decision in *Breswick & Co.* v. *United States*, 134 F. Supp. 132 (S. D. N. Y. 1955). The material that follows this assertion is replete with misstatement and omissions of material fact, as well as assertions not in any court's findings nor in the Record herein, but which are purely argumentative (for example, the last paragraph of page 8 and first paragraph on page 9 of the petition). Petitioner also fails to mention to this Court that in a later decision in the *Breswick* litigation, the court found that Alleghany continued to control another interstate carrier (through Pittston) until May 21, 1954,—i.e., three months *after* the transaction herein attacked. See *Breswick & Co.* v. *United States*, 138 F. Supp. 123 at 129, and 129 fn. 7a, and Judge Bryan's comment on this fact in *Schwartz* v. *Bowman*, 244 F. Supp. at p. 63.

The litigation in *Breswick & Co.* v. *United States* was a derivative action involving the validity of orders issued by the ICC in 1955, including two of the three orders which are

attacked here. App. 8a-10a, App. 11a-13a. That litigation did not attack the 1945 order which is here attacked. As Judge Bryan pointed out (244 F. Supp. at pp. 59-60), the plaintiffs in the *Breswick* litigation asserted, *inter alia,* the same grounds alleged here, but attacked a different transaction,—the proposed issuance by Alleghany of preferred stock—which was approved on June 22, 1955. Thus the principal attack in that litigation was upon the ICC order of March 2, 1955 which terminated the order of June 5, 1945 and continued ICC regulatory jurisdiction over Alleghany. It is the 1945 order which is principally attacked here.*

The *Breswick* litigation was properly brought under the Urgent Deficiencies Act before a 3-Judge court, with the ICC given an opportunity to defend its orders. As a consequence the *Breswick* litigation reached the merits of the ICC orders, which were finally upheld as a result of the dismissal of the *Breswick* complaint "on the merits". *Breswick & Co.* v. *United States,* 160 F. Supp. 754 at 757 (S. D. N. Y. 1958). The only relevance of the *Breswick* litigation to the instant litigation lies not in the facts but in the legal principle that the Urgent Deficiencies Act must be complied with in any attack on an ICC order.

Respondents Eaton, Tuohy and Eaton, Jr. do not accept petitioner's statement of the case, but will not burden this Court by noting other obvious departures from the accu-

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* As Judge Bryan correctly noted, petitioner's action also attacks the ICC orders of March 2 and May 24, 1955, which hold "that the June 5, 1945, order continued in force and effect until superseded by the new Division IV order of March 2, 1955." 244 F. Supp. 51, 59 fn. 2.

rate and exhaustive statement of fact and law fully set forth in the opinion of the District Court. Unlike plaintiffs in *Breswick,* petitioner has not complied with the jurisdictional requirements. Therefore Petitioner is not entitled to a hearing on the merits and his action was properly dismissed.

No Reason Is Shown for Granting a Writ of Certiorari

Petitioner urges two equally fallacious theories in seeking to evade the requirements of the Urgent Deficiencies Act

(a) that the extrinsic fact upon which the 1945 order was predicated (control of C&O by Alleghany) ceased to exist on January 19, 1954. Therefore the 1945 order no longer existed and could no longer be attacked. The order was a "nullity", "defunct", "void", etc, etc.

(b) that the 1945 order was merely declaratory of status and entailed no legal consequences. Therefore the order could not, when entered, have been reviewed by any court, resulted in no juristic consequences, and may now properly be attacked in this litigation because it was not an "order" within the meaning of the Urgent Deficiencies Act.

These two theories are not supported by any case law or other authority but are woven into the five points of the petition for certiorari. The following argument is in reply to the argument under the corfesponding Roman numerals in the Petition.

I.

(A) The *Griffin* and *Jones* Cases Were Both Within the Specific Exception of the Urgent Deficiencies Act.

The manifest purpose of the Urgent Deficiencies Act is to give the United States an opportunity to defend its own orders where matters of public interest are involved. Congress wisely provided certain exceptions where such a safeguard is inappropriate, one of them being any order "for the payment of money". 28 USC §2321. The two major areas within this exception are (1) rate reparation cases between shipper and railroad (see *e.g., Interstate Commerce Commission* v. *Atlantic Coast Line R. R.*, 383 U. S. 576 (1966)); and (2) cases concerning reimbursement to carriers by the Government for carriage of mail. See, *e.g., United States* v. *Griffin*, 303 U. S. 226 (1938), *United States* v. *Jones*, 336 U. S. 641 (1949).

The *Jones* and *Griffin* cases, upon which Petitioner relies in his Point I, are in this second area of the exception. In *Griffin* a carrier brought suit under the Urgent Deficiencies Act to set aside an order of the ICC which denied the carrier's application to increase the allowance for railway mail compensation theretofore made to the railroad. This Court stated:

> "The issue here is whether the existing mail revenue of $35,728 should be increased for the year by $31,227. . . . Only the method or amount of payments currently to be made would be affected." (303 U. S. at 234).
>
> . . . .
>
> "While the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ulti-

> mate question determined by the Commission is, as in the *Great Northern* case, the proper compensation to be paid by the Government to the railroad for services and the use of its property—the *quantum meruit* for carrying the mail. There is nothing in the history of the Railway Mail Pay Act which requires that the Urgent Deficiencies Act be made applicable to the determination of the validity of such orders." (303 U. S. at 237).

This Court has consistently treated orders under the Railway Mail Pay Act, 39 USC §§523-528 (which is not a part of the Interstate Commerce Act) as orders for the payment of money.

The Railway Mail Pay Act was also at issue in *United States* v. *Jones,* 336 U. S. 641 (1949), the second case relied upon by Petitioner under his Point I.

The U. S. Supreme Court, in dicta, stated in *Jones*:

> ". . . Since the very orders now in issue were involved in the *Griffin* case, it is settled that the railroad or its receivers had no recourse to a district court, under the Urgent Deficiencies Act, for securing review of the Commission's orders or relief of the type now sought." (336 U. S. at 647-48).

(B) The Remedy Sought Vitally Affects the Public Interest.

Petitioner argues "there is nothing in the case of such public importance and widespread effect . . . which warrants or justifies the imposition of the extraordinary remedies granted by the Urgent Deficiencies Act" (page 15 of Petition).

Judge Bryan effectively disposed of this argument. In footnote 5 of his opinion in *Schwartz* v. *Bowman,* 244 F.

Supp. at p. 66, he recognized that Plaintiff-Petitioner in this action prays for rescission of the transfer of a major block of New York Central stock *without prior ICC approval under Section 5(2) of the Interstate Commerce Act.* Petitioner would have the stock of New York Central returned to the C&O, thus transferring possible control of one of the key railroads of the United States to another major railroad system. Congress has vested "exclusive and plenary" authority in the ICC in regulating combinations and consolidations of carriers (49 USC §5(11)). That same Section 5 of the Act is the basis for the ICC order of June 5, 1945 and for the orders of March 2 and May 24, 1955.

The legal consequences of such an attack on those orders go far beyond the consequences of any attack on a mere order "for the payment of money". It is absurd to contend that this case is of no importance to the ICC or to the National Transportation Policy, since Petitioner's success could affect control over one of the largest railroads in the United States. This Court has established that any attack, direct or indirect, on ICC orders having legal consequences (and not within the specific exceptions of 28 USC §2321) must meet the requirements of the Urgent Deficiencies Act. 28 USC §2321; *Venner* v. *Michigan Central R.R.*, 271 U. S. 127 (1926). See also *Simpson* v. *South Western R.R.*, 231 F. 2d 59 (5th Cir. 1956) *cert. denied*, 352 U. S. 828 (1956); *Village of Mantorville* v. *Chicago Great Western Ry.*, 8 F. Supp. 791 (D. Minn. 1934).

Nor will the fact that the June 5, 1945 order is now "defunct" allow the appellant to circumvent the requirements of the Urgent Deficiencies Act. The March 2, 1955 ICC order terminated the 1945 order, while continuing the

ICC's regulatory jurisdiction under new orders. Petitioner's assertion is that the 1955 order also terminated the applicability of the Urgent Deficiencies Act to any attack on the 1945 order. This reasoning is patently false, for otherwise a plaintiff could delay bringing suit until an order had been terminated or superseded by another, and thus avoid the requirement that the suit be brought against the United States. Obviously the Commission has an interest in defending its regulatory orders, even after those orders are terminated. That is particularly the case here, where the order continues to have substantial legal consequences.

II.

There Is No Substance to Petitioner's Point II.

Petitioner's Point II is predicated on his argument that the *Griffin* and *Jones* cases create an unresolved question as to whether the instant case falls within the scope of the requirements of the Urgent Deficiencies Act. As shown under I above, both of those cases involved orders for the payment of money,—squarely within the exception specified in 28 USC §2321.

Petitioner cannot seriously contend that he will find himself "on a jurisdictional merry-go-round unless this Court grants certiorari and determines the question of jurisdiction". Petitioner had before him the precedent of the extensive litigation in *Breswick & Co.* v. *United States,* an action attacking two of the same orders of the ICC here attacked. The first decision in that litigation came before a single-Judge U. S. District Court; the action was not brought against the United States. Judge Walsh

refused to entertain that action which charged that Alleghany was an investment company subject to SEC regulation rather than a carrier subject to ICC regulation, on the ground that the plaintiffs must exhaust the administrative remedies, "including . . . review [of the Administrative action] in appropriate court proceedings." *Breswick & Co.* v. *Briggs,* 130 F. Supp. 953, 956 (S. D. N. Y. 1955). Thereafter the *Breswick* plaintiffs intervened in the proceedings before the ICC in *Louisville & Jeffersonville Bridge & R. R. Merger,* and proceeded from there to review the ICC's 1955 orders under the Urgent Deficiencies Act.

It is respectfully submitted that this decision and the subsequent *Breswick* litigation marked a clear jurisdictional course even if plaintiff overlooked the plain language of 28 USC §2321 and the cases construing that statute cited at p. 14, *supra.* In any event, neither inattention to nor ignorance of the law can create jurisdiction where petitioner has clearly flouted the statutory requirements created by Congress.

III.

The Decision of the Court of Appeals Below Is Not in Conflict With This Court's Decisions in the *Breswick*, *Rochester* or *Shanahan* Cases.

Petitioner's argument under his Point III apparently proceeds on his mistaken assumption that the order of June 5, 1945 had no legal consequences. The legal obligations and penalties for violation thereof imposed on Alleghany are outlined under Point V hereof. Briefly, under that order Alleghany was exempted from the Investment Company Act and from the operation of the antitrust laws, was

required to put certain of its other carrier holdings in trust, to terminate interlocking directorates, was required to make continuing reports and was subjected to regulation by the ICC with severe penalties for non-compliance.

It is established beyond any doubt that a final order which determines a status resulting in legal consequences is judicially reviewable under the Urgent Deficiencies Act. *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957); *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125 (1939); *Breswick & Co.* v. *United States*, 138 F. Supp. 123 (S. D. N. Y. 1955), *rev'd on other grounds, sub nom., Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957); *Breswick & Co.* v. *United States*, 134 F. Supp. 132 (S. D, N. Y. 1955).

In *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957), the exact question raised here was at issue, and indeed, two of the same ICC orders. There this Court held that an order which made a determination of status was reviewable under the Urgent Deficiencies Act. The ICC, pursuant to §5 (2)(a), 49 USC §5(2)(a), (the same section of the statute authorizing the June 5, 1945 order), approved, *inter alia*, the merger of a carrier, controlled by Alleghany, with certain other carriers, and ordered that Alleghany continue as "a non-carrier to be considered as a carrier" subject to the reporting and securities requirements of the ICC. *Louisville & Jeffersonville Bridge & R. R. Merger*, 290 ICC 725 (Div. 4 1955), *aff'd.*, 295 ICC 11 (1955).

An action was brought under the Urgent Deficiencies Act, by minority stockholders of Alleghany, to set aside the ICC order granting Alleghany the status of "a noncarrier to be considered as a carrier." The order was set aside and Alleghany appealed. Alleghany urged that the ICC orders

dealing with its status under the Interstate Commerce Act were not reviewable. This Court held:

> "Having acquired standing to institute proceedings in the District Court by virtue of the threatened financial injury, appellees could also attack the order of the Commission conferring on Alleghany the status of a person not a carrier but to be 'considered as a carrier.' *The status order was a source of the threatened financial injury.*" (*Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 160 (1957), Emphasis added).

Thus this Court affirmed those parts of the lower court rulings in *Breswick* which held that status orders from which legal consequences resulted were reviewable under the Urgent Deficiencies Act. In the second *Breswick* decision, wherein the three-Judge court granted a permanent injunction against implementation of the ICC status order (later reversed on the merits), the three-Judge court held:

> "The order granting Alleghany carrier status and approving the issuance of the new preferred stock is reviewable under the test enunciated in Rochester Tel. Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147. Rochester held that, when an administrative order causes a plaintiff some individual harm, he may seek review of the administrative action in the courts, but that, until the administrative action causes such harm, no review is possible, since the suit would ask 'review of interim steps in a proceeding' and would therefore be premature." (138 F. Supp. at 131). See also *Breswick & Co.* v. *United States*, 134 F. Supp. 132, 137 (S. D. N. Y. 1955).

Rochester Tel. Corp. v. *United States, supra,* is, of course, the landmark case which holds that status orders which

subject a person to legal consequences are reviewable. In *Rochester,* an order of an administrative agency which determined the status of a telephone company as being subject to the agency's jurisdiction was held reviewable under the Urgent Deficiencies Act because the status ruling subjected the company to prior mandatory orders. (307 U. S. at 143-144).

In relying on certain dicta in *Rochester,* discussed in connection with the question of finality of orders *re* judicial review, petitioner cites the case for the proposition that no status order is reviewable. In so doing, petitioner overlooks the Court's reasoning and ignores the holding. The Court's decision in *Rochester* turned on the question of whether a status order was final so that a "case or controversy" existed. This Court determined that status determinations are reviewable when they cause legal consequences. Just recently, this Court had occasion to interpret *Rochester* and it reiterated that proposition. In *Pennsylvania R. R.* v. *United States,* 363 U. S. 202 (1960), the Supreme Court stated:

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131, 132, 143." (363 U. S. at 205).

Similarly, in *Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151 (1957), the Supreme Court stated the *Rochester* holding in the following terms:

> "Whether reviewability of a status order, without more, be deemed a matter of standing to review or a matter of finality of administrative action, the

> basis for decision is the same: has the action of the administrative agency threatened the interests of the complainant, whether corporation or, as here, stockholder otherwise qualified to sue, sufficiently to allow attack?" (353 U. S. at 160, fn. 5).

In the words of one authority, "*Rochester* made clear that an order was ripe [for review] though it did nothing more than classify or establish a status, *when the effect of the declaration of status was to make applicable forthwith a corpus of statutes and regulations.*" Jaffe, *Ripeness and Reviewable Orders,* 61 Mich. L. Rev. 1273, 1280, fn. 29 (1963) (Emphasis added).

The ICC order of June 5, 1945, undisputedly valid when made, subjected Alleghany to regulation by the Interstate Commerce Commission and exempted it from regulation by the SEC. Petitioner's theory that its validity automatically ceased overnight without further findings or orders, and that it automatically ceased to be reviewable, could hardly have more far-reaching consequences.

To protect the public interest as well as the interests of all parties concerned in the complicated and specialized area entrusted to the jurisdiction of the Commission, Congress has established an exclusive method for the judicial review of ICC orders in 28 USC §§2321-2325. See *Powell* v. *United States,* 300 U. S. 276, 288-289 (1937). The Act has been applied broadly to all cases in which reviewable orders of the ICC are under attack, whether directly or indirectly. *Venner* v. *Michigan Cent. R. R.,* 271 U. S. 127 (1926); *Simpson* v. *South Western R. R.,* 231 F. 2d 59 (5th Cir. 1956) *cert. denied,* 352 U. S. 828 (1956).

The requirements of the Urgent Deficiencies Act are jurisdictional. *North Dakota ex rel Lemke* v. *Chicago &*

North Western Ry., 257 U. S. 485, 490 (1922). See also *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132, 136 (1947).

Petitioner offers no valid authority for the proposition that a status order of the ICC which results in legal consequences is not reviewable under the Urgent Deficiencies Act.

Shanahan v. *United States*, 303 U. S. 596 (1938) has been repeatedly distinguished by the Courts and authorities in the precise situation presented here. See, *e.g.*, the first *Breswick* decision, 134 F. Supp. at 137 (S. D. N. Y. 1955) and Jaffe, *Ripeness and Reviewable Orders*, 61 Mich. L. Rev. 1273 (1963) especially at fn. 29, page 1280.

IV.

The *Long Island RR* Case Cited by Petitioner Is in No Way Relevant to Any Issue Here Involved.

Petitioner asserts that the decision of the Court of Appeals below "is squarely in conflict with its own decision in *Long Island R. R.* v. *New York Central R. R.*, 281 F. 2d 379 (C. A. 2d 1960)". This is not so.

The *Long Island* case involved special provisions of the Interstate Commerce Act, to wit: Section 1(20) of the Act (49 USC §1(20)), which provides an exclusive enforcement method applicable only in the special situation presented in *Long Island*.

In that case the New York Central proposed to extend its railroad to a new freight depot under the purported authority of Section 1(18) of the Interstate Commerce Act,

49 USC §1(18). Under that Section, certain extensions are unlawful unless a certificate of convenience and necessity is issued by the ICC. Without seeking such a certificate Central filed a tariff schedule including the plans of extension. The Long Island, a competing carrier, protested to the ICC and the tariffs were suspended. The Long Island urged that a certificate was required and that the establishment of the service would violate §1(18) of the Interstate Commerce Act. A division of the ICC, without issuing an order with respect to a certificate of convenience and necessity, *found that no certificate was needed.*

The Interstate Commerce Act expressly limits the authority of the ICC to deciding whether a certificate of convenience or necessity should be granted or denied and to granting or denying such a certificate.

49 U. S. C. §1(20) provides:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section *may be enjoined by any court of competent jurisdiction* at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest. . . ." (Emphasis added).

The United States Supreme Court in *Powell* v. *United States,* 300 U. S. at 288-89 (1937), held:

> "The remedy provided by §1(20) is clearly inconsistent with a proceeding before the commission to attain the same end. Suits under that paragraph may not be tried before three judges. Those under the Urgent Deficiencies Act . . . to set aside orders of the commission cannot be tried in any other

> court. In suits under §1(20), appeals must be taken to the Circuit Court of Appeals. Appeals from district courts of three judges must be taken to this [the Supreme] court. The statutes cannot be construed to give the commission, a carrier or other party seeking to enforce §1(18) a choice of remedies, i.e., between a proceeding before the commission to invalidate the applicable tariff and a suit under §1(20). The latter is exclusive."

In *Long Island,* the Court of Appeals found *Powell* to be controlling. Since no order either granting or denying a certificate had been entered, the sole remedy available to plaintiff was a suit before a single-judge court pursuant to §1(20). See *Long Island R.R.* v. *New York Central R. R.,* 185 F. Supp. 673, 675-76 (E. D. N. Y. 1960), *aff'd* 281 F. 2d 379 (2d Cir. 1960). Aside from the fact that §1(20) of the Interstate Commerce Act governs violations of §1(18), it should also be noted that no valid ICC order was under attack in the *Long Island* case.

V.

Petitioner's Point V Is Specious.

Petitioner's argument in his Point V manifestly proceeds on his assumption that the Commission's order of June 5, 1945 was an incidental order merely declaratory of status and entailing no legal consequences. The speciousness of petitioner's argument is apparent from a review of the consequences visited upon Alleghany by the operation of 49 USC §5(3), to wit: the subjection of Alleghany to Sections 20(1) to (10) inclusive and 20a(2) to (11) inclusive.

The ICC order of June 5, 1945 visited the following consequences upon Alleghany, among others: It required Alleghany to place its control of U. S. Trucking Co. (via Pittston) in the hands of a voting trustee; to eliminate interlocking directorates with Pittston; to place in voting trust the stock of other carriers acquired in the future; to file copies of its trust agreements and to report quarterly any changes therein. It subjected Alleghany to regulation by the ICC as to reports, accounts, issues of securities, etc.

In addition it made Alleghany and its officers subject to the penalty provisions in Sections 20(7)(a) and 20a(11). Section 20(7) creates a forfeiture of $500 for each day Alleghany wilfully fails to file reports under Section 20. Section 20a(11) subjects Alleghany's officers and directors to fines of $1,000 to $10,000 and jail terms of one to three years for failure to comply with the securities requirements of Section 20a.

In addition, the order of June 5, 1945 exempted Alleghany from operation of the antitrust laws under Section 5(11) of the Interstate Commerce Act and took Alleghany out of the definition of an "investment company" within the meaning and applicability of the Investment Company Act of 1940 (15 USC §80a-3(c)(9)).

Finally, the ICC ordered retention of its jurisdiction and the continuing subjection of Alleghany to ICC regulation "unless and until otherwise ordered by this Commission".

CONCLUSION

There is no reason for granting a writ of certiorari, and the Petition should be denied.

Respectfully submitted,

CARL E. NEWTON
2 Wall Street
New York, New York 10005

M. LAUCK WALTON
2 Wall Street
New York, New York 10005

Attorneys for Respondents Cyrus S. Eaton, Walter J. Tuohy and Cyrus S. Eaton, Jr.